In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 303

UNITED STATES OF AMERICA, APPELLANT

v.

VON'S GROCERY COMPANY AND SHOPPING BAG FOOD STORES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

A brief reply is necessary to two new issues which appellees' brief has injected into this case.

1. Appellees rely extensively (*e.g.,* Br. 24–25) on articles in trade papers and other extra-record sources for the proposition that competitive conditions were unchanged after the merger. These sources give an incomplete and one-sided version of events in the relevant market since the merger.

(1) Substantial merger activity has continued unabated. Between 1961 and 1964, 14 independent supermarket operators and small chains located in the Los Angeles metropolitan area, with aggregate sales at the time of merger of almost $84 million, were acquired by the area's major chains (Appendix, *infra,* p. 5).

(2) The market share of the leading chains has continued to increase. Between 1958 and 1963,[1] the share of sales held by the 4 largest firms in Los Angeles County[2] rose from 24.6 to 30.3 percent, the share of the top 8 rose from 39.6 to 43.1 percent, and the share of the 20 largest rose from 54.8 to 60.5 percent.

(3) The number of grocery companies in the Los Angeles metropolitan area has continued to decline. There were 4,000 at the time of the merger in 1960 (Fdg. 73, R. 3084); three years later there were only 3,475 (*1963 Census of Business, Retail Trade* (*BC63-RS4*) (table captioned "Single Units and Multi-units").

In short, the structure of the relevant market has continued to deteriorate since the challenged merger.

[1] These statistics are from a Special Tabulation prepared by the Census Bureau on the basis of the 1963 Census of Business, and have only recently become available.

[2] Prior to 1963, the Census Bureau combined Orange and Los Angeles Counties to form the Los Angeles standard metropolitan statistical area. Beginning with the 1963 Census of Business, the Bureau provides statistics separately for each county. Since grocery sales in Los Angeles are 9 times as great as in Orange County, figures for Los Angeles County give a good indication of the picture throughout the metropolitan area. In fact, concentration figures for Los Angeles County, if anything, understate concentration on an area basis, since the grocery trade in Orange County is more highly concentrated. There, in 1963, the market share of the 4 leading chains was 43.2 percent. We note that the Special Tabulation shows a slight decline in the share of the 4 and 8 leading chains in Orange County between 1958 and 1963. The share of the 4 largest declined from 47.1 to 43.2 percent, and that of the 8 largest from 63 to 61.8 percent. (The 20 largest, however, increased their share from 77.2 to 79.6 percent.) In view of the smallness of the declines, the very high concentration levels even after the declines, and the fact that Orange County represents only 10 percent of the sales of the metropolitan area, we attach no significance to the declines.

The market may still be competitive. But the trend is clearly toward excessive concentration. Appellees err in suggesting that events since the merger prove there is no such trend.

2. In support of their argument that the Los Angeles retail grocery market is not, as we argue, threatened by concentration, appellees twice state (Br. 7, 12) that at the time of the challenged merger this market was atomistic under the test propounded in Kaysen and Turner, *Antitrust Policy* (1959). They have misread this work.

The language appellees quote defines a "loose oligopoly" as (p. 72) "a small number (less than twenty) of firms supplying 75 percent of the market, with no one supplying more than 10–15 percent and a fringe of smaller firms supplying the rest." In so defining "loose oligopoly", the authors do not suggest that any less concentrated market is atomistic. On the contrary, they adopt as the dividing point between oligopolistic and non-oligopolistic markets "a market share of one third of total market sales for the eight largest sellers" (p. 27). They then break down the oligopolistic sector into "Type I" and "Type II" oligopolies, and they define a Type II oligopoly as one where "[t]he first eight firms make 33 percent or more of the shipments, and the first twenty make less than 75 percent of the shipments" (p. 30). Under this test, the retail sale of grocery products in the Los Angeles metropolitan area was, on the eve of the merger, not an unconcentrated or atomistic market but a Type II oligopoly, since, all agree, the eight largest sellers had substantially more than one third of the market's total sales (see, *e.g.*, R. 3023). As we point out in our brief (p. 33), Professor Bain would also classify the rele-

vant market in this case as oligopolistic. See Bain, *Industrial Organization* (1959), pp. 32–33, 131–132.

Appellees evidently consider Kaysen and Turner's *Antitrust Policy* an authoritative work which represents a consensus of legal and economic thinking (see Br. 12n.). If so, they must agree that, on the eve of the merger of Von's and Shopping Bag, the relevant market was clearly threatened by undue concentration. In such a market setting, we submit, a merger that unites two of the handful of leading sellers is a matter of serious concern.[3]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1966.

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[3] *Antitrust Policy* also refutes appellees' assertion that "the Los Angeles market is one of the most unconcentrated and fragmented markets in America" (Br. 6). See, *e.g.*, *Antitrust Policy*, pp. 31–32, 35, 39, and 275 *et seq.* (statistical appendix).

Another example of misleading quotation occurs on page 10 of appellees' brief, where they quote from Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1317 (1965), as follows: "Widespread prohibition of mergers would impose serious, if not intolerable, burdens upon owners of businesses who wished to liquidate their holdings for irreproachable personal reasons. Moreover, economic welfare is significantly served by maintaining a good market for capital assets. * * *" As the context makes clear (see 78 Harv. L. Rev., pp. 1320-1322), the author was not advocating a relaxation of legal standards for testing horizontal mergers. Rather, "realizing that there are strong reasons for not interpreting the law so broadly as to limit unduly the number of potential purchasers of capital assets, we must recognize that the legal standards for various classes of mergers are interdependent. We cannot decide how far to go in prohibiting one kind of merger without having some idea of how far we have gone or should go with regard to the others." (P. 1320.) The author's conclusion was that the strictest rules should be reserved for horizontal mergers—like that at bar. (P. 1322.)

APPENDIX

Food store acquisitions in the Los Angeles metropolitan area 1961–64[1]

Year	Acquiring company	Acquired company (or stores)			Type of acquisition	
		Name	Number of stores	Sales (thousands)[2]	Horizontal	Other
1961	Acme Markets	Alpha Beta Food Markets	45	$79,042		X
	Boys Markets	Korys Markets	5	10,000	X	
	Food Giant Markets	McDaniels Markets	9	21,500	X	
	Mayfair Markets	Yorway Markets	1	1,500	X	
		Alpha Beta Food Markets	1	1,700	X	
1962	Mayfair Markets	Schaubs Market	1	1,800	X	
		Fox Markets	1	2,200	X	
	Ralph's Grocery Co.	Imperial Supreme Markets	1	916	X	
1963	Food Fair Stores	Fox Markets	22	44,419		X
	Kroger	Market Basket	53	110,860		X
	Mayfair Markets	Bi Rite Markets	1	2,560	X	
		Dales Food Market	1	2,200	X	
		Food Giant Markets	1	1,700	X	
1964	Albertson's, Inc.	Greater All American	14	30,308		X
	Mayfair Markets	Gateway Market	4	8,000	X	
		Pattons Markets	4	10,400	X	
	Ralph's Grocery Co.	Cracker Barrel Supermarket.	1	1,000	X	
	Food Giant Markets	McDaniels Markets	7	18,350	X	
	Total horizontal mergers.		38	83,836		
	Total market extension mergers.		134	264,629		

[1] Consists of Los Angeles and Orange Counties. (1963 census defined the Los Angeles metropolitan area as Los Angeles County only.)

[2] In most cases, sales are for the 12-month period prior to acquisition.

Source: Federal Trade Commission.

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